A German Jury Trial

Professor Samuel Williston in his book on Sales, in writing about German law says: "Its codification of the law is the most complete, the most modern, and the most scientific in the world."[1] It is my aim in this article to show the workings of the German criminal code of procedure as seen in a typical jury trial.

Jury trials are held in Germany only in certain of the more serious criminal cases.[2] There are, therefore, comparatively few jury trials, a fact which probably accounts for the paucity of hard and fast rules of evidence in the German law. For, as Professor Thayer long since pointed out,[3] "It is this institution of the jury which accounts for the common-law system of evidence." It is believed that a description of a German jury should prove interesting and instructive.

The court room in which the trial about to be described occurred was rectangular in shape. Across the back of the room, on a raised platform were a desk and three chairs for the three judges, the presiding judge sitting in the middle. To the right of the judges' bench, in the corner of the room, was a special desk for the government's attorney, and near that, along the righthand side of the room was the jury box with twelve chairs. In front of the jury box was a table and chairs for the expert witnesses. On the left-hand side of the room was the prisoner's box, in which the prisoner and a policeman sat. At the opposite end of this box from the bench were a chair and table for the clerk of the court. In front of the prisoner's box were chairs and a table for his attorney. In the corner of the room, between the judge's bench and the prisoner's box, was a special desk for the official reporter. On the opposite end of the room from the judges' bench were the seats for the public.

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[1] Williston on Sales, Section 293.
[2] Strafgesetzbuch, section 80.
[3] A Preliminary Treatise on Evidence at the Common Law, J. B. Thayer, page 2.

The judges, prosecuting and defending lawyers, and the reporter, wore black gowns, similar to those worn by candidates for the bachelor's degree in our American colleges. The gowns of all but the reporter had large black velvet collars. All the officials had in addition black velvet caps of various shapes, which they wore or not as they felt inclined. The various officials were distinguished from each other by the details of their dress, such as the shapes of their caps and the number and kinds of buttons at the throat and on the cuffs of their gowns.

The case under discussion was called at 8:30 A. M., in Munich, the capital of Bavaria. The prisoner was arraigned on five counts:

1. Smuggling;
2. For resisting arrest for the same;
3. For an attempt to commit murder;
4. For an attempt to commit simple manslaughter; and
5. For an attempt to commit aggravated manslaughter, i. e., according to German law, for attempting to kill an officer of the law.

As soon as the case was called, the roll was taken of the men who were called for jury duty, about twenty-four in number. If less than twenty-four men appear the number of those present must be raised to thirty.[4] Before the drawing of the names for jury duty the court is required to ask the prospective jurymen if they are for any reason disqualified to serve on the jury.[5] The grounds of disqualification are:[6]

1. If the crime charged has injured a man called for jury duty;
2. If a man called is, or has been, a husband or guardian of the prisoner, or of the person injured by the latter;
3. If a man called is of the accused's immediate family by blood, marriage or adoption; or if he is a third degree relative collaterally by blood, or second degree collaterally by marriage; these rules applying to relationships by marriage even though the marriage no longer continues;

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[4] Strafprozeszordnung, section 280.
[5] Strafprozesordnung, section 279.
[6] Strafprozeszordnung, section 22, 32.

4. If a man has been connected with the case as an employee of the prosecuting attorney's office, policeman, or as attorney of the person preferring the charges, or as attorney of the prisoner;
5. If a man summoned for jury duty has been called as a witness, lay or expert, in the case.

The decision as to a juryman's qualifications, reached after examination of the prospective juryman by the court, cannot be objected to.[5]

A proper number of qualified men being in court, the presiding judge proceeded to the impanelment of the jury. First he pulled slips of paper, with the names of those called for jury duty written on them, out of a glass urn which stood on the desk before him.[7] As he read the names on the slips, there was a momentary silence, and if neither side uttered the word, "abgelehnt," meaning "peremptorily challenged," the men were considered accepted and told to enter the jury box; so if council said; "angenommen," meaning "accepted."[8] The prosecution and defence may between them peremptorily challenge all but twelve of the men called. If the number is an odd one the defence may exercise the odd challenge.[9] In this particular case the jury box was filled in about five minutes, and there were only three or four men peremptorily challenged.

After the jury had been drawn, the presiding judge administered the oath to each of the twelve jurors, separately, saying:[10] "You swear by God Almighty and All-knowing, in the charge against John Doe of attempting to commit manslaughter, to faithfully do the duty of a juryman and to cast your vote according to the best of your knowledge and conscience," the jurymen replying separately: "I swear it, so help me God."

Then the presiding judge ordered the witnesses to be brought in and when they arrived, called off their names, instructed them as to their oath and duties, and excused them temporarily.[11]

After this the defendant was questioned as to his personal history, and then the official reporter read the report of the

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[7] Strafprozeszordnung, section 280, 281.
[8] Strafprozeszordnung, section 283.
[9] Strafprozeszordnung, section 282.
[10] Strafprozeszordnung, section 288.

preliminary hearings,[11] which included the prisoner's past history and some facts about him which seemed irrelevant. The writer was astounded, for instance, that the history should contain a statement of the fact that the prisoner had some time previously been unsuccessfully tried for seduction. This fact was also mentioned by the prosecution in its address to the jury, without objection or reprimand.

The reading of the report was followed by the examination of the prisoner, which was conducted by the presiding judge, as prescribed by the code.[12] This also seemed strange to one conversant with Anglo-American jurisprudence. While it is true that the prisoner was not obliged to answer any of the judge's questions, still, if he desired to remain silent, the result of such silence might be considered as an implied admission of guilt, and the defendant could hardly dare risk the comment upon, and deductions drawn from, his silence.

The presiding judge began by asking the prisoner to tell his story. As the prisoner told his version of the crime he was charged with having committed, the judge interrupted with questions and explained the prisoner's answers to the jury, often commenting upon them. The judge had the attitude, often adopted upon the Continent, that the accused was required to prove his innocence, and his examination was conducted from this point of view. All through the examination the judge tried to impeach the prisoner, requiring him to explain suspicious circumstances, apparent inconsistencies, and testimony conflicting with the story elicited in the preliminary hearings. The judge also charged the defendant with lying, and reproached him for it several times. The examination was a combination of direct and cross examination. The defendant's attorney was given no opportunity to assist the prisoner, nor to rehabilitate his testimony when the examination was completed, nor does the code provide for it. At the end of this questioning, the court explained the points of law involved in the case to the jury, and summarized the accused's story. Some of the remarkable features of this examination were the attitude of the court towards the prisoner, the speed of the court in getting through with the matter, and the inactive part counsel took in the proceedings.

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[11] Strafprozeszordnung, section 242.

The next step in the trial was the examination of the witnesses.[13] Those persons who have the privilege of not testifying if they desire not to, are:[14]

1. A person engaged to the accused;
2. The husband or wife of the accused; though the marriage relationship no longer continues;
3. Any one who is a member of the accused's immediate family by blood, marriage or adoption, or a third degree relative collaterally, by blood or a second degree relative collaterally by marriage, these provisions applying to the relationships by marriage though the marriages no longer exist;
4. Priests, ministers, attorneys and physicians, with regard to confidences imparted to them in the exercise of their professional duties; the priest, minister, attorney or physician determines at his discretion whether the communication is confidential or not. Attorneys and physicians must testify if they are expressly relieved from their duty of secrecy.
5. A witness may refuse his testimony if it will incriminate him, or any relative who is privileged not to testify, criminally.

Persons privileged to refuse their testimony are required to be instructed as to their rights. The privilege may be exercised at any time, even while the witness is testifying on the stand.

On demand a witness claiming to be privileged must prove the fact on which he bases his privilege but his oath is accepted as sufficient proof.[15]

Witnesses are examined unsworn,[16]

1. If they are not sixteen years old, or if, because of mental backwardness or weakness, they have not a sufficient understanding of the nature and meaning of the oath;
2. If they are, according to the criminal code, incapable of being examined as sworn witnesses;

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[12] Strafprozeszordnung, sections 136, 237, 242.
[13] Strafprozeszordnung, section 243.
[14] Strafprozeszordnung, section 51, 52, 54.
[15] Strafprozeszordnung, section 55.
[16] Strafprozeszordnung, section 56.

3. If they are either suspected or convicted of being connected with the case as principals, accomplices, or accessories.

It is at the discretion of the court, whether those witnesses, who are privileged to refuse their testimony, but nevertheless waive their privilege, shall testify sworn or unsworn. Such witnesses even after they are sworn may refuse to testify, and are required to be informed of this right.[17]

The witnesses in the case being described were called into the court room one by one, and the oath was administered to them by the presiding judge, who required them to say, "I swear by God Almighty and All-knowing that I will speak the pure truth, according to the best of my knowledge, that I will conceal nothing, and add nothing, so help me God."[18]

As a rule, the examination of the witnesses is conducted by the presiding justice, but by agreement of counsel the prosecution and defence may take over this examination, which, however, is not done very often.[19] The examination consisted of asking the witnesses questions followed immediately by a rather informal and moderate cross examination conducted by the court. The testimony was not taken down verbatim, but the official reporter took a few notes during the examination.

During the examination of the witnesses, as well as during that of the prisoner, the judge presented plans, maps, photographs, and so forth to the jury personally, at the same time explaining them. A few times during the questioning of the witnesses, the prosecution and defence put questions to the witnesses with the permission of the court, as is allowed by the code.[20] The settling of doubts as to the propriety of questions is entirely at the discretion of the court.[21] The presiding judge was very active at this stage of the proceedings, questioning in detail and commenting on the evidence as it was given. When witnesses testified as to acts involving motion, he often descended from the bench and personally made the witnesses repeat the motions being testified to. The

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[17] Strafprozeszordnung, section 57.
[18] Strafprozeszordnung, section 61, 62.
[19] Strafprozeszordnung, section 237, 238.
[20] Strafprozeszordnung, section 239.
[21] Strafprozeszordnung, section 241

defence once or twice attempted a cross examination, based on apparent inconsistencies in the testimony of the witnesses, but the court with a rather heavy hand, discouraged this, remarking that counsel should not be too critical. This illustrated the tendency of the court to support the testimony of the prosecution's witnesses, instead of cross examining sharply or allowing counsel to do so.

It might be mentioned at this point that opinion evidence was several times given without objection, as well as character evidence, neither being inadmissible at German law. Hearsay evidence is practically inadmissible at German law inasmuch as the code specifically provides that "whenever the proof of a fact depends on the perception of any person, that person must testify to the fact at the trial proper."[22] In some few cases the testimony of a witness at a previous trial may be read.[23] Broadly speaking it can be said that the whole matter of the examination of the witnesses and the taking of the evidence is entirely at the discretion of the court,[24] and that there are practically no hard and fast rules of evidence as we know them in our Anglo-American system of jurisprudence.

After the examination of the lay witnesses, the expert witnesses were called. The examination of these witnessses was identically the same as that of the lay witnesses. As all the witnesses concluded their testimony they were immediately paid their fees in cash by the clerk of the court.

At the conclusion of taking the evidence the court prepared to retire to frame the written questions which the jury were to answer, first listening to argument by counsel on the points of law at issue. After this the court went out, all those in the court room rising. The presiding justice, after the court returned, read and explained the questions, that had been framed, to the jury.[25]

After the questions for the jury had been discussed, the government's attorney addressed the jury.[26] This, according to the spectator's impression, was the only function of the prosecution, inasmuch as the court opened the case and conducted the examination of the prisoner and witnesses. The govern-

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[22] Strafprozeszordnung, section 249.
[23] Strafprozeszordnung, section 250.
[24] Strafprozeszordnung, section 240, 241.
[25] Strafprozeszordnung, section 290, 293.

ment attorney's address consisted simply of the presentation of the state's version of the crimes charged, without any attempt at eloquence or oratory.

The prosecution's address was followed by the address of the defence.[26] This also dealt simply with the facts involved and contained few appeals to prejudice or the feelings of the jurymen. Neither address contained any attacks on the witnesses. but the prosecution did refer to the unsuccessful seduction charge against the accused. After the defendant's lawyer argued to the jury, the court corrected some misstatements as to the matters of facts made in the former's address. This reopened the particular question of fact in issue and resulted in one of the witnesses being recalled and requestioned.

After this rebuttal addresses were made by the prosecution and defence respectively. Last of all the presiding judge charged the jury. The judge was very fair to both parties, giving a scholarly exposition of the law and only touching on the facts in order to apply the points of law involved, no comment on the facts being allowed in the charge by the code.[27] During the charge the presiding judge stated what is known in the Common Law as a rebuttable presumption, that a smuggler carrying arms is presumed to do so for smuggling purposes. After the jury had been instructed it retired, and some time later returned with its verdict. The foreman read the answers to the written questions of the court,[28] saying first: "On my honor and conscience I testify to the following as the verdict of the jurors:"—guilty on the charges of smuggling, resisting arrest for the same, and attempting to commit manslaughter, stating as required,[29] that the verdict was reached by a vote of more than seven to five. According to the German procedure,[30] he was immediately sentenced, the penalty being four years and three months in the Zuchthaus, (penitentiary), for attempted manslaughter and resisting arrest, ten months in the Gefängnis, (prison, a less unpleasant place than the Zuchthaus), a money fine or more time in the Gefängnis, and loss of certain civil rights,[31] such as the right

[26] Strafprozeszordnung, section 299.
[27] Strafprozeszordnung, section 300.
[28] Strafprozeszordnung, section 308.
[29] Strafprozeszordnung, section 307.
[30] Strafprozeszordnung, section 315.
[31] Strafgesetzbuch, section 33, 34.

to vote, hold office, etc., for five years. Altogether the trial of these five serious and complicated charges, took only about six hours.

The previous day a man was tried for murdering a diplomatic official and a policeman, and the trial was completed in less than a day. In this case the thoroughness of the administration of justice in Germany seems almost absurd to the American mind. For the court, after the jury had brought in a verdict of guilty on each charge not only sentenced the prisoner to death on each charge, and the loss of certain civil rights permanently, but ordered the revolver with which the murder had been committed, to be confiscated.

On the whole the typical German jury trial is characterized by thoroughness, (except in cross examination), by the fact that the court plays a most active part and counsel a rather inactive part, by the wide discretion invested in the court, and by the expedition with whch proceedings are handled.

The German system of criminal law and procedure doubtless provides a speedy administration of justice and tends to inculcate a wholesome respect for the law, but it may be questioned whether the innocent man has as good a chance to establish his innocence, as under the Anglo-American system of jurisprudence.

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